IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Criminal Appeal No.378 of 2006.

Date of decision: 15.5.2007

Yussuf Khan **..Appellant.**

Versus

State of H.P. **..Respondent**

Coram

The Hon'ble Mr. Justice Surjit Singh, J.
Whether approved for reporting ?[1] *yes*

For the Appellant : Mr. T.S. Chauhan, Advocate.

For the respondent : Mr. Ashok Chaudhary, Addl. A.G.

Surjit Singh, J.(oral)

1. Heard and gone through the record.

2. Appellant was sent up for trial for an offence under Section 376 read with Section 511 of the Indian Penal Code, for making an attempt to commit rape on a girl aged around 14 ½ years. The alleged incident had taken place on 13.1.2002, when the prosecutrix had gone to the fields to pick "saag" (tender leaves and shoots of mustard plants which are cooked as a vegetable dish), where the appellant allegedly pulled her shawl as a result of which the "saag" got scattered. Then he asked the prosecutrix to gather the scattered "saag" and carry the same to her house. When the prosecutrix started gathering the scattered "saag", the appellant allegedly caught her by her arms from behind and started pulling her towards the nullah and took her to some distance and

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement?***

there he removed her salwar and also unzipped his pants. The prosecutrix then gave a push to the appellant as a result of which he fell down. Taking advantage of this situation, the prosecutrix ran away from the spot half naked, i.e. without salwar to the house of Noordeen (PW12) where latter's wife Sayad Bibi (PW11) was present. The prosecutrix told said Sayad Bibi that the appellant had tried to commit rape on her and that her shawl, salwar and chappals were lying on the spot. She also told that the appellant had chased her and tried to over power her after she had pushed him and thrown him on the ground. Sayad Bibi (PW11) called a neighbour, named, Smt. Kalawati (PW5) and both of them went to the field. They saw the salwar and the chappals of the prosecutrix lying in the fields. They brought the salwar and the chappals to Sayad Bibi's house. Prosecutrix wore the salwar and chappals and then Noordeen (PW12) took her to her father's house.

3. Appellant denied the incident. The trial Court found him guilty and accordingly convicted him under Section 376 read with Section 511 I.P.C. and sentenced him to undergo rigorous imprisonment for five years and to pay a fine of Rs.30,000/-, in default of payment of fine, to undergo imprisonment for a further period of one year.

4. Submissions made by the learned counsel for the appellant are two pronged. Firstly, it is submitted that the evidence on record does not prove the involvement of the appellant in the commission of crime and secondly,

even if the appellant is assumed to be involved in the commission of crime, his act does not amount to offence of attempted rape, but to an indecent assault punishable under Section 354 I.P.C.

5. I have perused the record. There is overwhelming evidence showing the involvement of the appellant in the alleged incident. The prosecutrix herself appeared as PW-1 and testified the above stated facts. She also testified that when she went to the house of Noordeen (PW12), his wife Sayad Bibi (PW11) was there and she narrated the incident to her. She further stated that Sayad Bibi called Kalawati (PW5) and then Kalawati and Sayad Bibi both went to the fields and brought her salwar and pair of chappals. Her statement is fully corroborated by Kalawati (PW5) and Sayad Bibi (PW11). Both of them have stated that the prosecutrix was naked in the lower part of her body as she was not wearing the salwar and that she told that her salwar had been removed by the appellant with a view to committing rape on her, but she got herself released from his clutches by giving him a push as a result of which he fell on the ground and she got an opportunity to escape.

6. It is true that there is delay of three days in lodging the report with the police, but this delay is on account of the father of the prosecutrix being not available in the village as he was on duty at a different place as an employee of H.R.T.C. In any case, this delay cannot be said to be fatal when the version given by the prosecutrix is fully corroborated by independent

witnesses, i.e., Sayad Bibi (PW11) and Kalawati (PW5), to whom the incident was narrated by the prosecutrix soon after it happened and also by the recovery of the salwar and the chappals from the spot. Hence, the first limb of arguments of the learned counsel is rejected.

7. As regards the submission that this is a case of indecent assault and not of attempted rape, reliance is placed upon a judgment of the Hon'ble Supreme Court in ***Aman Kumar and another*** *Vs.* ***State of Haryana, (2004) 4 SCC 379.*** I have carefully gone through the judgement. In my considered view, the proposition of law laid down in this judgment does not advance the submission; rather it strengthens the prosecution plea that this was a case of attempted rape. It has been held in para 9 of this judgment that attempt to commit an offence begins when preparations are complete and the culprit commences to do something with intention of committing the offence and which is a step towards the commission of offence. It has further been held that the moment he commences to do an act with the necessary intention, he commences the attempt to commit the offence. In para 10 of the judgment, it has been held that an attempt to commit an offence is an act, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. It has also been held that an attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and,

possessing, except for failure to consummate, all the elements of the substantive crime.

8. Applying this interpretation of attempt to commit a crime to the facts of the case in hand, I have no manner of doubt that this is a case of attempted rape. The appellant first created a situation as a result of which it became easier for him to over-power the prosecutrix. Thereafter, he pulled her towards the Nullah and removed her salwar. Then he made her to lie down on the ground by use of force. Thereafter he unzipped his pants. The act of removing the salwar of the prosecutrix, as also the act of unzipping of his own pants, were beyond the stage of preparation. They were the acts by doing of which the appellant commenced the attempt to commit the offence. He failed to actually perpetrate the crime because the prosecutrix succeeded in throwing him on the ground by giving a push. In these circumstances, the case cannot be said to be one of indecent assault, but is of attempted rape.

9. Lastly, the learned counsel has submitted that leniency may be shown. I see no reason for taking a lenient view in the matter of award of punishment. The appellant, at the relevant time, was 25 years old. He was not adolescent. That means he was fully capable of controlling his passions. Therefore, prayer for reducing the sentence is also rejected.

In view of the above discussion, the appeal is dismissed.

May 15, 2007(ss) **(Surjit Singh), J**